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No. 97-1191

IN THE

Supreme Court of the United States

October Term, 1997

TRACI ANDERSON and CYNTHIA IRONS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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March 26, 1998

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The government does not argue an award of attorneys fees falls outside the plain language of 28 U.S.C. §2674, which provides,

> The United States *shall be liable* [under the FTCA] *in the same manner and to the same extent as a private individual under like circumstances . . .*

(Emphasis added.) Instead, it says only a statute which "mention[s] attorneys' fees" can "provide the requisite express waiver of sovereign immunity." (Brief in Opp. p. 3.) But requiring a mention of "attorneys fees" is only another way of applying a principle of narrow construction which this Court has repeatedly rejected in FTCA cases. (*See*, Pet. p. 6-8.) "A statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas v. United States*, 118 S.Ct. 469, 475 (1997). And 28 U.S.C. §2674 is unambiguous in its incorporation of all state law remedies but for specified exceptions.

Although the government argues the Ninth Circuit's decision is "consistent with the precedent of this Court" (Brief in Opp. p. 3), it cites no decision by this Court endorsing a rule of narrow construction of the waiver of sovereign immunity in the FTCA. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686 (1983), simply holds Congress "would have said so in far plainer language than" it used, if it in fact intended to make the United States liable for the *losing* party's

attorneys fees under the Clean Air Act. And in any event *Ruckelshaus'* language on construing waivers of sovereign immunity is in clear tension with the principles this Court has set over the past fifty years for construing the waiver in the FTCA. *See*, 463 U.S. at 685. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975), does not involve an award of attorneys fees against the United States. And in any event it does not address the standards for construing the waiver in the FTCA either.

Finally, the government argues the Equal Access to Justice Act "specifically excludes 'cases sounding in tort' from its waiver of sovereign immunity for attorneys' fees and expenses. 28 U.S.C. 2412(d)(1)(A)." (Brief in Opp. p. 9.) But all this exclusion does is implicitly allow state law to govern the availability of attorneys fees and expenses in tort claims against the United States. Here, state law, as incorporated by the FTCA, permits just such an award.

DATED: March 26, 1998.

Respectfully submitted,

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